

ANDERSON EXHIBIT 11

Fiske, Joseph - vol. II

In re: PHARMACEUTICAL)
INDUSTRY AVERAGE WHOLESALE)
PRICE LITIGATION) MDL No. 1456
THIS DOCUMENT RELATES TO:) Civil Action No.
US ex rel Ven-A-Care of) 01-12257-PBS
the Florida Keys, Inc.)
v. Abbott Laboratories, Inc.)
No. 07-CV-11618-PBS)

VIDEOTAPED ORAL DEPOSITION OF JOSEPH E. FISKE

volume 1

February 17, 2009

DEPOSITION upon videotaped oral examination, of the witness, JOSEPH E. FISKE, taken on behalf of Ven-A-Care of the Florida Keys, Inc. in the above entitled cause pending in the United States District Court, District of Massachusetts, before TAMMY POZZI, Certified Shorthand Reporter in and for the State of Texas, on February 17, 2009, in the law offices of Jones Day, 77 West Wacker, 35th Floor, Chicago, Illinois, between the hours of 9:05 a.m. and 4:49 p.m., pursuant to due notice and the Federal Rules of Civil Procedure.

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6 yesterday -- I take it you reviewed those -- reviewed
7 those documents yesterday with Mr. Berlin, correct?

8 A. There were documents that we reviewed
9 yesterday, as well as documents that I had reviewed
10 at other times, like I said, when I was reading the
deposi- -- depositions --

11 Q. Uh-huh.

12 A. -- and I don't recall whether we reviewed
13 any documents when we met a few weeks ago.

14 Q. Other -- other than reviewing documents
15 with Mr. Berlin and reviewing deposition exhibits
16 that were a part of the DeYoung, Joe Fiske, and Beth
17 Garvin depositions, did you review any other
18 documents?

19 A. I looked at some bid schedules. I looked
20 at some contract documents. I looked at some price
21 increase notifications. I believe that's the extent
22 of what I looked at.

23 Q. Did you review any documentation from the
24 Managed Care division or department?

25 A. No, I didn't.

0015 Q. Did you review any bid materials exchanged
1 between Abbott and customers, such as GPOs or chain
2 pharmacies or wholesalers who would request that
3 Abbott bid for placement of its drugs on those
4 customers' formularies?

5 A. Only to the extent that they may have been
6 part of the documents that I reviewed that were part
7 of previous depositions.

8 Q. Did you review any government documentation
9 such as OIG reports?

10 A. Not at this point in time. I've seen such
11 documents over the -- over the course of my career in
12 Pricing.

13 Q. When -- let me back up a step. When I
14 refer to the "OIG," do you understand I'm referring
15 to the Office of Inspector General for Health and
16 Human Services?

17 A. Yes.

18 Q. Okay. When -- strike that.

19 In what context in the past have you
20 reviewed OIG reports?

21 A. Periodically people would send me reports,
22 and I can't tell you exactly in what context. One I
23 remember is a report regarding GPO admin fees that
24 was issued -- I believe it was OIG that issued it --

0016 25 indicating that -- I believe that a number of GPOs
1 were passing those admin fees along to their
2 customers, which would imply that they were a
3 discount rather than just an admin fee.

4 Q. Can you remember the subject matter of any
5 other OIG reports that you reviewed?

6 A. Not that I reviewed. There -- there -- I'm
7 sure there are others that I have seen. I just --

8 Q. Uh-huh.

9 A. -- don't recall right off the top of my
10 head.

11 Q. Other than the -- the OIG reports
12 pertaining to administrative fees of GPOs, are you
13 aware of any other OIG reports reviewed by Abbott
14 personnel --

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16 A. Yes.

17 Q. -- specifically? Which ones?

18 A. Martha Schrader was familiar with OIG
19 reports that were issued regarding the fact that AWP
20 pricing reported by the data agencies did not reflect
21 actual acquisition costs by retail pharmacies.

22 Q. That -- you gained that information in your
23 discussion with Ms. Schrader recently?

24 A. Yes.

25 Q. When did Ms. Schrader review those reports?

0017 1 A. She didn't give me a specific time frame.
2 I didn't ask her for a specific time frame.

3 Q. Did Ms. Schrader provide you with those --
4 any copies of those reports?

5 A. No, she didn't.

6 Q. What was your understanding of the findings
7 of these reports?

8 A. They were reports that were issued, I
9 believe, to Health and Human Services -- and
10 obviously available, actually, for the public, which
11 means states and others would have access to them --
12 that, as I described previously, indicated that AWP
13 as reported by the -- by the data agencies overstated
14 acqu- -- actual acquisition costs versus what
15 pharmacies were actually paying for product.

16 Q. Do you have any understanding of the
17 specific findings with respect to how much AWP
18 overstated actual acquisition cost?

19 A. No, I don't.

20 Q. Do you have any information about the
21 findings of these reports with respect to generic
22 drugs versus brand drugs?

23 A. No, I don't.

24 Q. Do you have any information about the
25 findings of these reports with respect to any given

0018 manufacturer's drugs?

1 A. No, I don't.

2 Q. Do you know whether it was one single
3 report or multiple reports that Ms. Schrader had
4 reviewed?

5 A. From my discussion, I believe it was
6 multiple reports, but I can't state that with
7 certainty.

8 Q. Did you gain any understanding about the
9 context in which Ms. Schrader reviewed these reports?

10 A. Martha Schrader is, as I described
11 previously, our Divisional Vice President for Public
12 Policy and Strategy.

13 Q. Uh-huh.

14 A. She had previously worked for another
15 manufacturer. I don't know exactly what her
16 responsibilities were there. But in the course of
17 her job responsibilities, she keeps abreast of
18 legislation, reports that are coming out from the
19 government, etcetera, as it might affect the industry
20 in general.

21 Q. Has Ms. Schrader or anyone working for
22 Ms. Schrader ever had any responsibility for setting
23 of prices on Abbott drugs?

24 A. No.

25 0019

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2

3 Q. To your knowledge, has anyone at Abbott
4 who's ever had any responsibility for setting prices
5 on Abbott drugs reviewed any OIG reports concerning
6 AWP?

7 MR. BERLIN: Objection, form and
8 scope.

9 A. I don't know because I don't know whether I
10 have actually specifically seen such a report
11 myself. I -- as I indicated, I believe I've seen and
12 read a -- a number of OIG reports, but I do an awful
13 lot of reading in my job, and I can't remember
14 specifically everything I've read.

15 Q. (BY MR. ANDERSON): Do you have any copies
16 of any OIG reports in your files concerning published
17 pricing such as AWP pricing?

18 A. I don't believe so, but I may have. I
19 don't know.

20 Q. Have you searched for those?

21 A. When we searched for files for production
22 for this case, we looked through any files that may
23 have been labeled "AWP" or -- and I don't have a file
24 that's called "OIG," so... We produced everything
25 that we had.

26 Q. So if you had any --

27 A. I couldn't have looked through every file
0020 that I have, quite honestly.

28 Q. Well, I understand, but I'm saying, to your
29 knowledge, as the Abbott corporate representative,
30 any OIG reports that would have been maintained in
31 the files of Abbott personnel responsible for price
32 setting would have been located in your prior
33 searches; is that correct?

34 MR. BERLIN: Objection, form, scope.

35 A. I -- I can't state for certainty. My
36 personal experience is that we have very man- -- you
37 know, many, many files. We try and produce
38 everything that's related to a case when it's -- when
39 the information is listed out for us in terms of what
40 we need to provide.

41 It's possible that things may have
42 been overlooked by somebody, but to the best of my
43 knowledge, everything was produced that was
44 available.

45 Q. (BY MR. ANDERSON): Is your awareness of
46 any Abbott personnel's review of OIG reports limited
47 to what you learned from Ms. Schrader?

48 A. Yes, I believe so.

49 Q. And Ms. Schrader didn't share with you any
50 documentation regarding any OIG reports that she had
51 reviewed, did she?

52 A. No, she did not.

53 Q. And you're not able to recall any of the
54 specifics about the time frame for which the report
55 was published, etcetera?

56 MR. BERLIN: Objection, form.

57 A. I didn't specifically ask that question.

58 Q. (BY MR. ANDERSON): Okay. Do you have any
59 information whatsoever that Ms. Schrader shared her
60 awareness of the OIG reports concerning AWP pricing
61 with any other Abbott personnel, other than you,
62 obviously, in preparing to testify?

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13 A. I'm going to answer the question this way,
14 but I -- it is somewhat speculative. She manages a
15 group of people. And, in fact, one of the people who
16 worked for her at one point in time used to do web
17 searches for different kinds of information affecting
18 the industry, and she -- she may have shared such
19 information with one of her employees or he may have
20 been the source for the -- for the report but I don't
21 know.
22 To my knowledge, she did not share
23 that information with Pricing and Planning, but I
24 wa- -- I want to be careful because the employee,
25 Tom -- I can't recall his last name right now -- used
0022 to actually copy us periodically on, like, a -- a --
1 a daily newsletter of key happenings, just excerpts
2 of things.
3 But I don't recall specifically an OIG
4 report coming from Martha's group to us.
5 Q. How long has Martha been in her -- well,
6 strike that.
7 How long has Ms. Schrader been with
8 Abbott?
9 A. Six years.
10 Q. So the earliest time frame that she could
11 have been reviewing OIG reports while at Abbott would
12 have been 2003 -- 2002 at the earliest?
13 A. Correct. But she -- as I indicated, she
14 had similar responsibilities, I believe, at another
15 company. But at Abbott, that's a correct statement.
16 Q. Right. What was that other company?
17 A. I think it was Amgen, but I --
18 Q. Okay.
19 A. -- I don't want to be -- I may be mistaken.
20 Q. But not a company that was affiliated in
21 any way with Abbott?
22 A. Not to my knowledge.
23 Q. Okay. All right. We'll come back to that
24 potentially.
25 what did you discuss with Ms. Tobiason
0023

1 in prep- -- preparation to testify as the corporate
2 representative?

3 A. I actually just reviewed the various topics
4 that I was supposed to be prepared to testify on and
5 actually went through them one by one with her. She
6 had very little knowledge about most of those
7 issues.

8 Her title is Senior Director of
9 Reimbursement for Corporate. She's held -- I think
10 she's been with Abbott since 1994. She started off
11 in the Hospital Products Division where she was
12 Director of Reimbursement for the Home Infusion
13 group --

14 Q. Uh-huh.

15 A. -- subsequently worked in ADD as Director
16 of Reimbursement. Her focus was not on oral
17 pharmaceuticals. Her focus has always been on -- on
18 "Part B drugs," I'll refer to them as -- I'm sure
19 you know what I mean --

20 Q. Uh-huh.

21 A. -- Medicare Part B, or devices.
22 And so when I talked with her, she --

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10 can't recall.
11 Q. And it -- it looked -- it had the same type
12 of form cover letter that's shown on the second page
13 of Exhibit 9?
14 A. I'm -- I'm -- I'm sorry. I recall this
(indicating).
15 Q. The stamp?
16 A. The stamp, that's all I specifically
17 recall.
18 Q. All right.
19 A. I don't -- I don't remember what we
20 reviewed.
21 Q. Does Exhibit 9 appear to you, sir, to be an
22 example of a standard communication that Abbott sent
23 out to the pricing compendia?
24 A. It -- it looks like a communication to a
25 pricing compendia, yes.

0136 Q. And there's -- I notice the first page is a
1 fax cover sheet from Abbott in this case to Medical
2 Economics, correct?
3 A. Yes.
4 Q. Do you believe that this same type of fax
5 cover sheet would have been utilized to transmit the
6 same type of information to First DataBank as well?
7 A. Something similar to that.
8 Q. So looking at the second page of Exhibit 9,
9 I -- do you agree with me that that is a form cover
10 letter that Abbott would create to transmit
11 information to data vendors?
12 A. I would agree with that, yes.

13 Q. And the data vendors would include First
14 DataBank and Red Book and Medi-Span, correct?
15 A. Yes.
16 Q. And those are the same three data service
17 companies that were referenced at the bottom of the
18 first page of Exhibit 8, correct?
19 A. (Reviews document.) Yes.
20 Q. Why did --
21 A. Well, two of them.
22 Q. Why -- why did Abbott report information to
23 the data vendors such as that shown in Exhibit 9?
24 MR. BERLIN: Objection, form, asked

0137 and answered.
1 A. It was our standard practice whenever we
2 launched a product to report the pricing information
3 to the data vendors. It had always been done.
4 Q. (BY MR. ANDERSON): Other than the fact
5 that it was something Abbott itself had always done,
6 was there any other information that underlied Abbott
7 reporting this type of information to the data
8 vendors?
9 A. Not that I became aware of during my
10 investigation.
11 Q. I notice on the third page of Exhibit 9 is
12 the beginning of a price list, correct?
13 A. Yes.
14 Q. And there's -- there's three different
15 types of prices listed. One is list price, the other
16 is case price, and the last one is AWP price,
17 correct?
18 A. Yes.

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21 Q. And so those would be prices that Abbott
22 had set and, in turn, communicated to the data
23 vendors, correct?
24 A. Yes.
25 Q. How did Abbott --

0138 A. Well, we communicated an estimated AWP. We
1 set the WAC and the list price.
2 Q. Where --
3 A. The WAC price being the case price.
4 Q. Where is the AWP information noted to be an
5 estimate?
6 A. I'm telling you that it was always an
7 estimate. We actually changed the column at a
8 subsequent date to read that it was an estimate to
9 avoid any confusion.

10 Q. How might it be confusing if the AWP
11 weren't noted to be an estimate?
12 A. I don't have an answer for that question.
13 Q. Do you agree that to the extent Abbott was
14 reporting, quote, "AWPs" to the data vendors, it
15 would appear that Abbott is setting the AWPs?
16 MR. BERLIN: Objection, form.

17 Objection, scope.
18 A. I don't agree with that.
19 Q. (BY MR. ANDERSON): What information would
20 indicate that Abbott is not controlling this AWP?
21 A. Pardon me?
22 MR. BERLIN: Objection, form.

23 Objection, scope.
24 Q. (BY MR. ANDERSON): What -- what
25 information would indicate that Abbott is not
0139 controlling the setting of these AWPs?
1 MR. BERLIN: Objection, form.
2 Objection, scope.
3 A. There's no information on this sheet that
4 says that.
5 Q. (BY MR. ANDERSON): Is there any
6 information other -- beyond this sheet that you know
7 of?
8 MR. BERLIN: Objection, form.
9 Objection, scope. But you -- you can answer.
10 A. All -- all I can continue to go back to,
11 Mr. Anderson, is the conversation that Mark Turon
12 had, for example, with Kay Morgan; that despite the
13 fact that manufacturers may have been providing
14 estimated AWPs, that the data vendors, especially
15 First DataBank, was actually verifying or confirming
16 what a correct AWP should be with the wholesalers
17 themselves.
18 Q. (BY MR. ANDERSON): Did Mark indicate how
19 long that conversation list- -- lasted?
20 A. No, he didn't. Knowing Mark Turon, it
21 could have been an hour. He's a very -- very
22 talkative man.
23 Q. And Mr. Turon is still with Abbott today?
24 A. He -- he works for Ross Pharmaceuticals.
25

0140 I -- actually, it's called Abbott Nutritionals, Inc.
1 today, which is a division of Abbott Laboratories.
2 Q. Was he with Ross when he had this
3 conversation with Kay?
4

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15 Q. Did Abbott make any disclosures to any
16 state Medicaid program about the discrepancies
17 between its AWPs and its AMPs?
18 MR. BERLIN: Objection, form.
19 Objection to the term "discrepancy".
20 A. Did we?
21 Q. (BY MR. ANDERSON): Yes, sir.
22 A. No. Other than the states -- once we were
23 required to report AMPs, the -- the four states that
24 we had to report them to.
25 Q. The four states in the past three or four
0240 years or so?
1 A. It may have been longer with Texas, but
2 yeah, that's right.
3 Q. Now I'm shifting, Mr. Fiske, to topic
4 number 6. I'll ask some foundational questions
5 first. Did Abbott publish direct or list prices for
6 the erythromycins?
7 A. We communicated a WAC and a list price.
8 Q. And -- and generally, the -- the list price
9 was simply five percent higher than the WAC price,
10 correct?
11 A. Correct.
12 Q. And was the list price set off of the WAC
13 or vice versa?
14 A. WAC was established and divided by .95 to
15 arrive at the list price.
16 Q. Okay. And, likewise, WAC was the starting
17 point for the calculation of the estimated AWP by
18 Abbott, correct?
19 A. Yes.
20 Q. With respect to topic number 6, did you
21 gather any information in preparing to testify?
22 MR. BERLIN: Make sure you're --
23 the -- the designation goes on to the second page of
24 what you have.
25 A. (Reviews document.) The individuals I
0241 spoke with had no knowledge regarding this topic
1 whatsoever.
2 People within the Pricing and
3 Contracting Department, including myself and Ronny
4 Lancaster, who is our Senior Manager for Government
5 Pricing, replaced Debbie DeYoung, are aware of the
6 fact that we have reported AMPs to the government
7 since 1991 and that -- you know, that this whole
8 thing, the way it's worded, is -- it sort of
9 misrepresents the facts.
10 We didn't cause publication of direct
11 or list prices that were higher than the prices
12 generally paid because we had a WAC and a list price
13 that was generally paid by purchasers at all times,
14 as was a base deal price generally paid by other
15 customers, as was a contract price, as I said before,
16 generally paid by the customers that purchased that
17 contract price. So --
18 MR. BERLIN: I think we need to -- I
19 think he may have misspoken, and I need to talk to
20 him to get him to clarify that now.
21 MR. ANDERSON: Well, I -- I'd like to
22 follow up on that. I may clarify it now.
23 MR. BERLIN: Well -- well, no. I
24